LOW EAN NEE v. SNE MARKETING SDN BHD

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
HASHIM HAMZAH JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1925-10-2021]
25 OCTOBER 2023
[2023] CLJ (JT22)

Abstract – *The right of inspection of a company's accounts and other records may only be exercised by a director holding office. Such right, which is an absolute right, flows from his office as a director and enables him to properly perform his duties as a director, exercised for the benefit of the company. In exercising the right of inspection, the director need not demonstrate any particular ground or 'need to know' as a basis. However, once the person ceases to be a director, the statutory right of inspection also ceases.*

COMPANY LAW: *Directors – Authority – Right to inspect company's accounting and other records – Whether absolute right of director – Whether concomitant of fiduciary duties of good faith, care, skill and diligence – Whether company mandatorily obliged to allow inspection – Whether director required to provide covenant or reasons for inspection – Whether lodgement of report against other directors of company construed as improper motive against company – Whether director intended to injure company – Whether amounted to disqualification for application under s. 245 of Companies Act 2016*

COMPANY LAW: *Directors – Removal – Application under s. 245 of Companies Act 2016 for inspection of company's accounting and other records – Whether absolute right of director – Whether right exists due to nature of director's duties and to enable him to properly perform his duties as director – Whether right lapsed upon removal of director*

On 12 March 2019, the appellant, a shareholder and director of the respondent, a multi-level direct marketing company, lodged a police report against Low Cheng Teik ('LCT'), the chairman and a director of the respondent, alleging, *inter alia*, that he had wrongfully transferred a trademark belonging to the respondent to SNE Global Sdn Bhd ('SNE-G'). LCT's daughter, Low Poh Ling ('LPL') was a shareholder and director of SNE-G. The appellant further alleged that her signature had been forged on several directors' resolutions and that there was defalcation of funds of the respondent by the other directors of the respondent. Following the police report, the respondent's premises was raided by the police, and documents were confiscated. LCT was charged with criminal breach of trust ('CBT') under s. 409 of the Penal Code, while LPL was charged with abetting LCT. However, both

LCT and LPL were discharged and acquitted of the charges. In the meantime, the appellant filed an action under s. 346 of the Companies Act 2016 ('CA') ('oppression suit') against LCT and the other directors and shareholders, alleging oppressive conduct towards her. The oppression suit was dismissed by the High Court. Upon appeal, the Court of Appeal agreed with the appellant's contention that the assignment of the SNE Trademark to SNE-G was a manifestation of oppressive conduct. The respondent's appeal to the Federal Court was pending. By a letter dated 27 October 2020, the appellant requested the respondent to provide her the respondent's accounting documents or records as particularised in Annexure A of the originating summons ('OS'), filed in order for her to be allowed to inspect and make copies of the documents. The request was made against the backdrop of the various actions taken against LCT and/or other directors and shareholders of the respondent. The respondent having initially taken the position that they were unable to provide the documents, giving various reasons, subsequently indicated that they would allow inspection on the condition that the appellant gave a covenant that she would not use the documents for any ulterior and/or improper purpose that was detrimental to the interest of the respondent. The appellant took the position that, as a director, she had the absolute right to inspect the documents and she was not required to provide any covenant or reason to do so. The appellant was 'removed' as a director of the respondent on 9 December 2021 *via* a director's resolution. The High Court, in dismissing the application, was of the view that the appellant was not entitled to exercise her statutory right of inspection of the documents, *inter alia*, because (i) the appellant was effectively a non-participating director of the respondent; (ii) the appellant was actuated by *mala fides*; and (iii) the documents were not necessary and the appellant did not need them in carrying out her duties as a director of the respondent.

Held (dismissing appeal with no order as to costs)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) There is no residual discretion in the court to refuse inspection. The right of a director of a company, to inspect the company's accounting and other records, is a right existing at common law. Thus, s. 254 of the CA is declaratory of the director's common law right. Further, a director's right to inspect accounting and financial records is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, must be exercised for the benefit of the company. Thus, the obligation of the company to allow inspection by its director is regarded as mandatory. Being an 'absolute' right, a director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis. The appellant, as a director of the respondent, had the absolute right to inspect the documents and was not required to provide any covenant or reasons for the inspection. (paras 39-42)

(2) The commencement of the oppression suit and the lodging of the police report, pertaining to the unlawful assignment of the trademark to SNE-G, which led to LCT and his daughter being charged for CBT, could not be construed as an ulterior or improper motive on the part of the appellant against the respondent itself. There was no evidence of intention by the appellant to injure the respondent. The actions were manifestations of the appellant's right as a shareholder/director of the respondent to protect and preserve the assets of the respondent – the trademark which LCT had assigned to his daughter's company for a mere RM10. The appellant was justified in mounting the oppression suit. (paras 43, 46 & 54)

(3) The oppression suit and the CBT charge merely demonstrated hostility towards the other directors and shareholders of the respondent and not the respondent itself. The appellant's hostility towards her co-directors was not a disqualification for an application under s. 245 of the CA. The fact that the appellant was an inactive director was also irrelevant. In fact, her hostility towards her co-directors and her passiveness as a director of the respondent made it even more compelling that she should be given the right to inspect the documents, which in law, is an 'absolute right'. Hence, the High Court decision in refusing to make the order under s. 245 of the CA was, in all the circumstances, plainly wrong and warranted appellate intervention. (paras 46 & 55)

(4) An ex-director is not entitled to seek the aid of the court for an order of inspection. A director's right to inspect and, if necessary, take copies of documents belonging to a company are due to 'the nature of a director's duties and to enable him to properly perform his duties as a director' (*Haw Par Bros (Pte) Ltd v. Dato Aw Kow* ('*Haw Par*')). The appellant was removed as a director of the appellant by a directors' resolution dated 9 December 2021. Therefore, applying the principle in *Haw Par*, upon the appellant ceasing to be a director, she was no longer entitled to seek relief under s. 245 of the CA. (paras 57 & 66-68)

(5) The issue of the appellant's removal as a director and the *Haw Par* principle were not taken up in the respondent's original submissions before this court; these matters came up during the course of oral submissions and questions posed by this court. In the circumstances, although the appeal stood dismissed, the respondent had failed in so far as the merits of the appeal were concerned. In the circumstances, the court exercised its discretion under O. 59 r. 2(2) of the Rules of Court 2012 and declined to award costs to the respondent. (paras 70 & 71)

Case(s) referred to:

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2018] 2 CLJ 103 HC ***(refd)***

Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741 CA ***(refd)***

Dato Aw Kow v. Haw Par Bros (Pte) Ltd & Anor [1972] 1 LNS 25 HC ***(refd)***

Funerals Of Distinction Pty Ltd [1963] NSWR 614 ***(refd)***

Haw Par Bros (Pte) Ltd v. Dato Aw Kow [1973] 1 LNS 44 ***(foll)***

Ho Yee Chin v. Ho Min Hao & Ors [2016] 6 CLJ 728 HC ***(refd)***

Liaw Yeou Huah v. Wong Kee Kian & Ors [2016] 1 LNS 1810 HC ***(refd)***

Loh Teck Wah v. Lim Pang Kiam & Ors [2022] 6 CLJ 549 HC ***(refd)***

Low Ean Nee v. Low Cheng Teik & Ors [2023] 2 CLJ 19 CA ***(refd)***

Low Ean Nee v. SNE Marketing Sdn Bhd [2022] 1 LNS 981 HC ***(refd)***

Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd [2009] 10 CLJ 273 HC ***(refd)***

Tan Kim Hop & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741 CA ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 167(3), (6), (7)

Companies Act 2016, ss. 206(1)(a), 245(1), (4), (8), (9), 254, 346

Penal Code, s. 409

Rules of Court 2012, O. 59 r. 2(2)

Companies Act [Sing], s. 167(5)

Other source(s) referred to:

Lau Zhong Yan & Sebastian Liew Tzen Jue, *A Director's Absolute and Unqualified Right to Inspection: Section 245 of the Companies Act 2016, a Statutory Mandate*, [2021] 3 MLJ clxix

Walter Woon on Company Law, 3rd edn, p 415

For the appellant - Conrad Young Wye King, Alfred Lai Choong Wui & Cheng Xin Yan; M/s Alfred Lai & Partners

For the respondent - Arjan Pursumal & Vasdev G Bakshani; M/s Vasdev Bakhsani & Assocs

[Editor's note: For the High Court judgment, please see Low Ean Nee v. SNE Marketing Sdn Bhd [2022] 1 LNS 981 (affirmed).]

Reported by S Barathi

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner dated 28 September 2021 dismissing an application by the appellant made under s. 254 of the Companies Act 2016 ("the application") that she be allowed to inspect the accounting and other records of the respondent for the financial years 2015 to 2019. The decision of the High

Court which gave rise to the present appeal is reported as *Low Ean Nee v. SNE Marketing Sdn Bhd* [2022] 1 LNS 981; [2022] 4 AMR 843; [2022] MLJU 1002.

[2] The respondent is a multi-level direct marketing company which supplies food supplements, nutritional supplements, and dietetic substances for medicinal use that bear the trademark SNE and its variants thereof. At the material time when the application was made, the appellant was a shareholder and a director of the respondent. She is still a shareholder of the respondent.

[3] The appellant was "removed" as a director of the respondent on 9 December 2021. Her removal as a director was done *via* a directors' resolution. As such, after the High Court had delivered its decision and after notice of appeal in respect of the instant appeal was filed, the appellant "ceased" to be a director. The first question in this appeal pertains to the merits of the application and the issue is whether, as contended by the appellant, the learned Commissioner had erred in law in dismissing the application. The second question arises out of the appellant's removal as a director post the High Court's decision. The question is whether by reason of the principle that was enunciated by the Singapore Court of Appeal in the case of *Haw Par Bros (Pte) Ltd v. Dato Aw Kow* [1973] 1 LNS 44; [1973] 2 MLJ 169 (SGCA), the appellant, being an "ex-director" (with effect from 9 December 2021), is not entitled to seek the statutory right of inspection under s. 254 of the Companies Act 2016.

Background

[4] At all material times, the appellant was, and still, is a shareholder of the respondent. She has been a director of the respondent since 22 May 2003. The respondent's shareholders and directors (as at 24 March 2021), are as follows:

(i) Low Ean Nee (the appellant) – 50% (director)

(ii) Low Cheng Teik ("LCT")* – 39.7% (director/chairman)

(iii) Low Hock Boon (son of LCT)** – 10% (director)

(iv) Lau See Yoong – 0.3% (director)

* LCT is the appellant's paternal uncle

* * Low Hock Boon is the appellant's cousin

[5] The appellant sent letters requesting the respondent to allow her to inspect the respondent's accounting documents or records as particularised in Annexure A to the originating summons dated 7 April 2021 ("the documents").

[6] The appellant's request for inspection was made against the backdrop of various actions which she had earlier taken *vis-a-vis* LCT and/or the other directors and shareholders of the respondent. On or about January 2019, the appellant visited the office of the respondent's company secretary. She searched and made copies of the respondent's documents, including documents that are (allegedly) the subject matter of the application.

[7] On 12 March 2019, the appellant lodged a police report against LCT and alleged, *inter alia*, that he had wrongfully transferred a trademark belonging to the respondent to SNE Global Sdn Bhd ("SNE-G"). LCT's daughter, Low Poh Ling ("LPL"), is a shareholder and director of SNE- G. The appellant further alleged that her signature had been forged on several directors' resolutions and that there was defalcation of funds of the respondent by the other directors of the respondent.

[8] Following the police report, on 16 April 2019, the respondent's premises were raided by the police, and documents were confiscated. LCT was charged with criminal breach of trust ("CBT") under s. 409 of the Penal Code. His daughter, LPL, was subsequently charged with abetting him in the offence of CBT. On 14 December 2020, LCT and LPL were both discharged and acquitted by the Sessions Court at the end of the prosecution's case. The prosecution's appeal to the High Court was subsequently dismissed on 9 August 2021.

[9] In the meanwhile, on 14 October 2019, the appellant filed an action under s. 346 of the Companies Act 2016 ("the oppression suit") *via* Kuala Lumpur High Court Originating Summons No: WA-24NCC-536-10/2019 against LCT and the other directors and shareholders, alleging oppressive conduct towards her.

[10] In the oppression suit, the appellant claimed, *inter alia*, that the affairs of the respondent were not conducted in accordance with its articles of association, that the respondent had failed to secure a reasonable or better price for disposal of the respondent's assets, that there had been mismanagement in the respondent and that the funds of the respondent were not properly utilised. One of the key complaints in the oppression suit was the assignment of the respondent's trademark to SNE-G for a mere RM10. The appellant also alleged that her signature which appeared in 32 board of directors' resolutions, was forged.

[11] On 13 July 2020, the High Court dismissed the oppression suit. The appellant appealed to the Court of Appeal *via* Court of Appeal Civil Appeal No: W-02 (NCC)(A)-909-07/2020. On 13 September 2022, the appellant's appeal was allowed (see: *Low Ean Nee v. Low Cheng Teik & Ors* [2023] 2 CLJ 19). The Court of Appeal agreed with the appellant's contention that the assignment of the SNE trademark to SNE-G was a manifestation of oppressive conduct. The Court of Appeal held [35], "the actions of the first

to third respondents were calculated to benefit them indirectly *via* other corporate entities controlled and/or related by them to the prejudice of the appellant being a substantial 50% shareholder of the fourth respondent. The assignment of the trademark at the consideration of RM10 is unquestionably dubious here. This smacks of non-compliance of norms of fair dealing and violation of conditions off air play and hence oppressive. Consequently, we find the learned High Court Judge has committed a misdirection by finding there was no oppression on the appellant by the first to third respondents. In other words, there was a failure to appreciate that the majority of the directors failed to act in the best interest of the appellant *vis-a-vis* fourth respondent. The affairs of the company were conducted effectively to sideline and exclude the appellant's interest as a shareholder and director."

[12] The respondents in the oppression suit filed an application for leave to appeal to the Federal Court. On 28 March 2023, the Federal Court granted leave to appeal on certain questions of law. The substantive appeal (per Federal Court Civil Appeal No: 02(f)-30-04/2023) is yet to be disposed.

[13] Back to the issue of the appellant's request for inspection of documents. By a letter dated 27 October 2020, the appellant requested the respondent to provide her the documents for inspection. By a letter dated 11 November 2020, the respondent took the position that they were unable to provide the documents. They gave various reasons.

[14] On 2 December 2020, the appellant replied to the respondent's letter dated 11 November 2020 and again requested the respondent to provide the documents for her inspection. The appellant claimed that the respondent failed to reply to the appellant's letter dated 2 December 2020.

[15] On 3 March 2021, the appellant wrote to the respondent and reminded the respondent on her request for the documents. By letter dated 5 March 2021, the respondent replied to the appellant's said letter and alleged as follows:

(i) the respondent alleged that it had sent a letter dated 9 December 2020 to the appellant and the appellant failed to respond to para. 6 of the respondent's said letter;

(ii) the respondent is willing to allow the appellant to inspect the documents upon receiving the appellant's reply to the respondent's letter dated 9 December 2020; and

(iii) the appellant has copies of most of the documents in view of the oppression suit initiated by the appellant in the Kuala Lumpur High Court and the pending appeal to the Court of Appeal at the material time.

[16] The appellant maintained that she did not receive the respondent's letter dated 9 December 2020 and requested for a copy of the same *via* her letter dated 8 March 2021. Thereafter, the respondent's letter dated 9 December 2020 was forwarded to the appellant on 10 March 2021. In essence, *via* para. 6 of the respondent's letter, the appellant was asked to justify her request for the documents and to provide a covenant that she will not use the documents for any ulterior and/or improper purpose that is detrimental to the interest of the respondent. Paragraph 6 of the respondent's letter dated 9 December 2020 is significant as it was an integral part of the High Court's decision to dismiss the application. The respondent's stance in refusing to grant the appellant the right to inspect and to take copies of the relevant documents may be seen from paras. 4 to 6 of their letter dated 9 December 2020 which reads as follows:

> 4. Instead, you have made copies of some of the documents and wrongfully exposed the Company and Its other directors to unnecessary litigation. This is evident in your alleged oppression action (Kuala Lumpur High Court Suit No. WA-24NCC-536-10/2019) which has been dismissed by the Honourable Court and the criminal proceedings against Dato' Seri Low Cheng Teik *vide* Sessions Court Case No. WA-62K-56-07/2019. Your actions thus far has been detrimental to the Company, its officers and other shareholders, and exposed the Company and its directors to unnecessary litigation costs when they (the Company and its officers) should be focussing on developing its business, more so in these challenging times. Suffice it to say that whilst we have no objections to your request, we have reason to be sceptical of your intentions and demands.
>
> 5. We also note that there is no urgency in providing you access to all the documents requested and we will in due course make available the documents for your inspection. The time period stated in your letter is unfair and unreasonable.
>
> 6. While the Company acknowledges a director's right to inspect certain documents of the Company, in light of your actions described in Item 4 above, *perhaps you could explain the reason you require these voluminous documents now, after so many years when these documents have always been available to you and you never expressed any interest in any of them.* Please include in your response *a covenant that you will not use the information obtained will not be used for any ulterior and/or an improper purpose that is detrimental to the interest of the Company*. (emphasis added)

[17] We may now examine the respondent's reasons for refusing inspection. In the affidavit in reply by Low Hock Boon, affirmed on 2 August 2021, it was stated as follows:

> 3. In reply to para. 12 of the Plaintiffs AIR, the Defendant states that the Plaintiff has never shown any interest in the business nor affairs of the Defendant. This is also apparent from the fact that despite the Plaintiff having full and unrestricted access to all the Defendant's records,

including accounting records, the Plaintiff chose never to do so. **In light of the Plaintiff's past mischiefs**, it is apparent that the Plaintiff's objective in purportedly exercising her rights *vide* this suit as a Director is tainted with *mala fides* as can be seen from the events leading from the police report to the Criminal Suit against the Managing Director of the Defendant and the oppression suit against the shareholders and the Defendant/Company, both of which have been dismissed by the respective Honourable Courts.

4. In the circumstances, the Defendant had for good reason denied the Plaintiff's request and demands unless the Plaintiff complies with the Defendant's request in their letter dated 09.12.2020 (Exhibit LBH 14). The Defendant is merely acting in the best interest of the Company/ Defendant and wish to avoid being continuously engaged with the Plaintiff in futile litigation exercises which drains their resources, time and energies and therefore prejudicial to the reputation, business and affairs of the Defendant.

5. In the circumstances, the Plaintiff's allegation in para. 15(ii) and 15(iii) of the Plaintiff's AIR of being accountable under the law to manage the Company as a Director is also misconceived and or misplaced as none of the Directors nor the shareholders nor the Defendant have ever held the Plaintiff accountable as a Director nor shareholder of the Company, particularly since the Plaintiff has never expressed any interest in the management, business, activities nor affairs of the Defendant. In addition the Plaintiff also failed in her duties as a Director in refusing to execute the letter of offer from Maybank Islamic Bank Berhad as referred to in para. 15(iv) of the Plaintiff's AIR.

6. In reply to para. 15(iv) of the Plaintiff's AIR, the Defendant states that the request for the Plaintiff as a signatory/guarantor was imposed by Maybank Islamic Bank Berhad as the Plaintiff was one of the directors of the Defendant.

6.1 In order to justify the acquisition of the property, details of the need for the property to capitalize on the current market trends of a "buyers' market' were also shared with the Plaintiff *vide* a power point presentation. However, the Plaintiff refused to sign the Letter of Offer although the Defendant had responded to the Plaintiff's queries in her letter of 13.04.2021 *vide* a power point presentation.

A copy of the Plaintiff's email dated 20.04.2021 enclosing the power point presentation is now produced herewith and marked as Exhibit LHB-19.

Clearly the reasons stated in para. 15(v) of the Plaintiff's AIR is an after thought to now justify her wrongful refusal to sign as a guarantor. The Plaintiff must surely be aware that it is part of a Director's duty and responsibility to also execute guarantees as may necessarily be required by a financial institution(s) for the

benefit of the Company, especially since the Defendant has explained the logical and commercial reasons and need for the Defendant to acquire its own business premises.

6.2 The Plaintiff has also refused to fulfill her responsibility and duty as a Director of the Defendant when she failed to attend a Directors meeting on 14.04.2021 despite appropriate notice being given in accordance with the with the Memorandum and Articles of Association, which required seven (7) Notice in advance of a Directors meeting. On the contrary, and in response, the Plaintiff made an unreasonable demand that she required at least 3-4 weeks' notice for the same. A copy of the Defendant's Memorandum and Articles of Association and the Plaintiff's email of 27.04.2021 is now produced herewith and marked as Exhibit LHB-20 and LBH 21 respectively.

7. Clearly, the Plaintiff has not expressed any interest in the management, operations and affairs of the Defendant nor expressed any intention to participate fruitfully or productively to carry out her duties as a Director. Instead, the Plaintiff has only been disruptive to the business of the Defendant. In the circumstance, the only honourable thing that the Plaintiff should do is to resign as a Director and allow the Defendant to grow and progress.

7.1 The Plaintiff's conduct of continuously harassing the Defendant and its active directors with numerous demands, which demands could well have been answered at Directors' meeting(s), is prejudicial to the Defendant's growth and progress.

Plaintiff Never Performed Her Duties As A Director

8. The Plaintiff's allegation in para. 18, 19, 20 and 21 of the Plaintiff's AIR that she owes a statutory and fiduciary duty towards the Defendant, clearly contradicts her actions from the outset. The Plaintiff's continued conduct of harassing the Defendant and its Directors clearly show that she (the Plaintiff) never had the best interest of the Company at heart.

9. Premised on the Plaintiff's actions/conduct, her refusal to participate in the Director's meeting for frivolous reasons and the continued harassment, the only and sole purpose of the inspection must be to use the Requested documents to launch unfounded attacks on the Defendant and its Directors in the management of the affairs of the Defendant (as done before in the oppression suit) to the detriment of the Defendant and the lodging of a police report which led to the Criminal Suit.

10. I re-emphasize that the Defendant has never before restrained the Plaintiff from coming into the Defendant's office and inspecting any of its records, including making copies of the same. The breakdown of the relationship with the Plaintiff was purely attributed to the Plaintiff's wrongful actions/misconduct and lack of *bona fides* which actions are detrimental to the Defendant's business and reputation in the multi-level marketing industry.

11. The Plaintiff has repeatedly shown impropriety in the purpose of seeking the reliefs prayed for which are unrelated to the discharge of her duties as a non-performing Director. Therefore the inspection of the documents, and requests for copies of such documents ought not to be allowed unconditionally especially since the Plaintiff is a Director without any functions or duties. (emphasis added)

[18] The appellant's response per her affidavit in reply affirmed on 18 August 2021 is relevant. In her affidavit in reply, she stated (at para. [15]) the following:

I reiterate that:

(i) the right to inspect documents and to take copies of them is essential to the proper performance of a director's duties;

(ii) even though I do rely upon other directors including Dato Seri Low Cheng Teik and Low Hock Boon in the conduct of the Defendant's affairs, I am accountable under the law to manage the company I serve as a director;

(iii) hence, I must be at liberty to satisfy myself in relation to all matters relating to the company's business, without which, I would not be able to discharge my duty with care, skill and diligence;

(iv) for example, I was included as one of the signatories (without my express consent) to sign and to be one of the guarantors for the banking facility *vide* the Defendant's letter dated 10.05.2021 which enclosed an offer from Maybank Islamic Berhad to obtain a loan facility for the purchase of a Defendant's property; and

(v) in the above instant, I was unwilling to execute the said loan facility as I do not have a full or complete view of the Defendant's financial state of affairs and I have been denied access to the Defendant's books and records *ie*, the Requested documents.

21. Paragraphs 20 to 24 of AIR No. 1 are unfounded. I state that:

(i) for so long as I remain a director of the Defendant, I retain a right of inspection of the accounting and other records of the Defendant and to take copies of them;

(ii) the Defendant's mere allegations that I am hostile, the possibility of abuse or misuse of the right of inspection does not afford any ground for its denial or restriction. Further, the Requested documents are common accounting records of the Defendant. I fail to understand how, if the Defendant's accounting records are properly prepared and kept, a director's inspection of the same could amount to an 'abuse';

(iii) the recent breakdown of the relationship between the other directors of the Defendant and myself makes this application for inspection more so crucial given the lack of co-operation by the rest of the Defendant's directors;

A **A Director's Right To Inspect The Documents – Companies Act 2016**

[19] The following statutory provisions are relevant to the director's right of inspection.

Section 245(1) of the Companies Act 2016:

B (1) A company, the directors and managers of a company shall-

(a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and

C (b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

Section 245(4) of the Companies Act 2016:

D (4) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open for inspection by the directors.

Section 245(8) of the Companies Act 2016:

E (8) The Court may, in any particular case, order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, subject to a written undertaking given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

F Section 245(9) of the Companies Act 2016:

(9) The company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

G **[20]** It is relevant to mention that some of the case laws referred to on this subject are based on the provisions under the Companies Act 1965. In this regard, s. 167(3), (6) and (7) of the Companies Act 1965 are the same as s. 245(4), (8) and (9) of the Companies Act 2016 except for s. 245(9) of the H Companies Act 2016, wherein a fine of RM5,000 or a term of imprisonment of six months or both as provided for in s. 167(7) of the Companies Act 1965 has been increased to a maximum fine of RM500,000, or a term of imprisonment not exceeding three years or to both.

Director's Right To Inspect – The Contentions

I **[21]** The appellant took the position that, as a director, she has the absolute right to inspect the documents and she is not required to provide any covenant or reason to do so. The appellant relied on the case of *Dato' Tan*

Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741; [2009] 2 MLJ 527 (per Low Hop Bing JCA) which laid down the principles as follows:

> [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s. 199 of the Singapore Companies Act (equipollent to our s. 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, *inter alia*, that:
>
> (1) the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s. 199 of the Companies Act. Such right is a *concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory*.
>
> (2) this right has been described as being "absolute". *A director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis: Molomby. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute'*: ...
>
> (3) *there is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him*; ...
>
> (4) *the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company* ... (emphasis added)

[22] In so far as giving reasons for the inspection, counsel for the appellant referred to the case of *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273, where the High Court opined that the applicant (director) "was not obliged under the law to justify his request to inspect the accounts of the company". In *Ho Yee Chin v. Ho Min Hao & Ors* [2016] 6 CLJ 728, the High Court had held that, "the plaintiff was still a director at the time she requested for the company's records, she was not obliged to provide a reason for her request. The onus was on the defendants to prove *mala fides* and unless the burden was discharged, it must be assumed that the plaintiff would exercise the right for the benefit of the company."

[23] As mentioned earlier, the respondent had indicated that they would only allow inspection on condition that the appellant gives a covenant that she will not use the information obtained for any ulterior purpose and/or an improper purpose that is detrimental to the interest of the respondent. In response, counsel for the appellant referred *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103, where the High Court held as follows:

> [26] The Court of Appeal in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* also made clear that *a director's right to inspect the accounting records is absolute in the sense that he is entitled to inspection without subject to any requirement to provide any reason for the inspection*. The courts do not even have any residual discretion to refuse inspection by a director. A director's statutory right of inspection may only be refused if the director is exercising his right of inspection for some ulterior purpose or to injure the company.
>
> [27] It would be a complete misconception of the true meaning of the directors' inspection rights if the company seeks to qualify the exercise of such inspection right. It would thus be *wholly unwarranted for a company to demand as a condition permitting inspection for the requesting director to execute a non-disclosure or confidentiality agreement precisely by reason of the trite legal position that the director's fiduciary duties to the company already impose strict duties against any infringement of confidentiality or injury to the company*.
>
> (emphasis added)

[24] In opposing the application, the respondent said that the appellant had engaged in "mischief" (see: para. [17] of this judgment). In this regard, the respondent has described the appellant's past conduct, *inter alia*, in lodging a police report against LCT and mounting the oppression suit as mischief.

[25] In response, it was argued for the appellant that it was her constitutional right to commence legal actions in court for her transgressed rights using the accounting records of the respondent against the relevant parties. Counsel said commencement of legal actions in court to ventilate grievances and vindicate personal rights is certainly not and cannot by any stretch, be an ulterior or improper motive.

[26] According to counsel for the appellant, the commencement of the oppression suit and the lodging of the police report (which complained of the unlawful transfer of the respondent's property, *ie*, its trademark "SNE", by one of the respondent's directors) which led to LCT and his daughter being charged for CBT are also not, and cannot by any stretch be an ulterior or improper motive on the part of the appellant against the respondent itself. It may have been against others, but certainly not the respondent itself.

[27] Hence, counsel's complaint was that the learned Judicial Commissioner failed to appreciate that the ulterior or improper motive referred to in the case of *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated*

Sdn Bhd [2008] 1 LNS 741; [2009] 2 MLJ 527 or *Liaw Yeou Huah v. Wong Kee Kian & Ors* [2016] 1 LNS 1810; [2016] MLJU 1589 are confined to motives against the company, not others like directors or shareholders of the company. The oppression suit and the CBT charge merely show hostility towards the other directors and shareholders of the respondent and not the respondent itself.

[28] In conclusion, it was submitted that the appellant cannot be precluded from exercising her rights of inspection of the documents as a director of the respondent, even if there is a possibility that future litigation may ensue from the inspection of the documents in furtherance of the ongoing hostility between the directors and shareholders of the respondent. Counsel referred to the High Court's decision in *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273, at [11] where the court said relevantly:

> [11] When these competing contentions are considered it is evident that:
>
> (i) The real hostility is between Mirza and the other directors and shareholders of the company, not between Mirza and the company *per se*. The fact that further litigation may ensue means that there is a possibility that there will be further litigation between Mirza and the other directors and shareholders of the company. In *Welch & Anor v. Britannia Industries Pte Ltd* [1993] 1 SLR 673 it was held *inter alia*, that an intention to wrest control of the company from other shareholders cannot be regarded as synonymous with an intention to injure the company. Even if this extends to an intention to force control of the company to one party, that intention will not deprive that same party of the right of inspection.
>
> The exercise of the directors' right of inspection is not extortion or oppression, nor is an intention to remove any person from the management of a company *per se* an improper purpose. Given the wide compass of a director's right of inspection, and as s. 167(6) is an adjunct to this right, *it does not follow that simply because there is a possibility that future litigation may ensue from an inspection in furtherance of the ongoing hostility between the directors and shareholders of the company, that Mirza should be precluded from exercising his rights of inspection as a director*. (emphasis added)

[29] And in *Loh Teck Wah v. Lim Pang Kiam & Ors* [2022] 6 CLJ 549, the court opined that the fact that parties were at loggerheads was of little relevance and was no bar to an application under s. 245 of the Companies Act 2016. Indeed, the court went further to say that, "hostility might often be the explanation for the application in the first place." In *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103, the High Court touched on the same point and opined [93]:

> *that a director may be hostile towards the company or its staff does not limit the inspection right and the right to take copies. The mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction. A director retains*

this right of inspection (inclusive of the right to be supplied with copies of documents so inspected), despite mere allegations that he is hostile, adverse or a competitor of the corporation, for as long as he remains a director of the company.

(emphasis added)

The High Court's Decision

[30] On 28 September 2021, the learned Judicial Commissioner dismissed the application. The appellant appealed to the Court of Appeal against the decision of the High Court *via* notice of appeal dated 14 October 2021. It is germane to note here that the appellant was a director of the respondent when she filed the application on 7 April 2021, and later when she filed the notice of appeal on 14 October 2021. In dismissing the application, the High Court was of the view that the appellant is not entitled to exercise her statutory right of inspection of the documents, *inter alia*, because she was effectively a non-participating director of the respondent (see: para. [24] of the grounds of judgment).

[31] The learned Judicial Commissioner concluded that the appellant was actuated by *mala fides* and that the documents were not necessary and the appellant did not need them in carrying out her duties as a director of the respondent (see: para. [27] of the grounds of judgment).

[32] The learned Judicial Commissioner's reasons for dismissing the application may be gathered from the following paragraphs of the grounds of judgment which read as follows:

[17] There are a few reasons which led the court to this finding. Firstly, the defendant had on multiple occasions enquired with the plaintiff on the reason why she requires access to the documents. The defendant issued letters dated 9 December 2020 and 19 March 2021, and in the letters, raised the fact that when the plaintiff was given access to the defendant's documents, she had used them to expose the defendant to unnecessary litigation. Further, the defendant highlighted that the documents were available to the plaintiff at all times, but the plaintiff had never shown any interest in the documents or in the business of the defendant.

[18] The defendant also requested for an undertaking that the plaintiff will not use the documents for any ulterior and/or improper purpose that would be detrimental to the interest of the defendant.

[19] The plaintiff did not respond to the letters, and did not provide any reason why she required the documents. The undertaking requested by the defendant was also not forthcoming.

[20] The failure to provide reasons and to provide the undertaking, together with the plaintiff's previous action in using the defendant's documents to which she was given access, to lodge a police report against Dato' Seri Low Cheng Teik and to initiate the Oppression Action, have led the court to find that the defendant has proven that the plaintiff's request for inspection of the documents is made in bad faith and with an ulterior, improper or collateral purpose.

[22] In this instance, I find that there is more than mere allegations of hostility or adversity against the plaintiff. This is a case where there is clear evidence that would warrant refusal to allow her access to the documents. Her past acts in using the defendant's documents to initiate actions against other directors and the defendant (which actions have proven to be frivolous), raise serious questions on whether the request for access is in fact made in good faith.

[23] Her previous actions notwithstanding, the court acknowledges that as a director, it is well within the plaintiff's rights to question the management and conduct of the defendant, and to take the necessary actions in the event of mismanagement or misconduct. But what strengthens the defendant's position is the plaintiff's refusal to provide an undertaking that she will not use the documents for any ulterior and/or improper purpose that would be detrimental to the interest of the defendant.

[24] Finally, a fact raised by the defendant that remains largely unrebutted by the plaintiff is that the plaintiff had never been interested in the management or affairs of the defendant. The defendant was managed by Dato' Seri Low Cheng Teik, Lau See Yoong and Low Hock Boon, and the plaintiff played no role or part the in management of the defendant. The plaintiff did not express any interest to participate in management, she did not visit the defendant's office, and she did not attend any event organised by the defendant. She was effectively a non-participating director of the defendant.

...

[27] A similar situation arises in this instant case. Considering the lack of interest of the plaintiff in the management of the defendant, and the fact that she was hardly involved or engaged in the business of the defendant, the court finds it inconceivable that the documents are required to assist the plaintiff in undertaking her duties as a director.

E. Decision

[28] In the circumstances, the court finds that the defendant has provided sufficient evidence to prove that the request for the documents is unrelated to the discharge of the plaintiff's duties as a director, and is actuated by an ulterior motive, which would be detrimental to the interest of the defendant.

[29] It is on this basis that the court dismissed the originating summons, with costs.

Our Decision

[33] There is no denial that historically, the appellant has had a stormy relationship with the other directors. She had previously lodged a police report against LCT alleging that he had committed CBT in connection with the respondent's "SNE" trademark which was purportedly assigned for a nominal consideration of RM10 to SNE-G. LCT's daughter, LPL, is a

director and shareholder of SNE-G. Consequently, LCT was charged in the Sessions Court for the offence of CBT under s. 409 of the Penal Code. LPL was charged with having abetted LCT in the CBT offence.

[34] On 14 December 2020, LCT and LPL were both acquitted and discharged without their defence being called as the Sessions Court held that prosecution had failed to establish a *prima facie* case against both the accused persons. The prosecutor's appeal to the High Court was later dismissed.

[35] In the meanwhile, on 14 October 2019 the appellant commenced the oppression suit. The appellant raised a plethora of complaints in support of the oppression suit. On 13 July 2020, the High Court dismissed the oppression suit. The appellant appealed to the Court of Appeal *via* Civil Appeal No: W-02(NCC)(A)-909-07/2020. On 13 September 2022, the Court of Appeal allowed the appellant's appeal. The Court of Appeal's decision is reported as [2023] 2 CLJ 19. The matter is now pending in the Federal Court *via* Federal Court Civil Appeal No: 02(f)-30-04/2023.

[36] As mentioned earlier, the appellant's attempt to inspect the respondent's accounting and financial records was vehemently resisted by the respondent. The respondent's unyielding position was that the appellant was guilty of mischief and was using the statutory right under s. 245 of the Companies Act 2016 to gain access to the respondent's documents, and to use them to injure the respondent.

[37] It was also contended that the appellant was not interested in the affairs of the respondent and not involved in the day-to-day management of the business of the respondent. The respondent wanted to extract a covenant from the appellant that the documents would not be misused. The appellant was not prepared to give any such covenant.

[38] As far as the appellant was concerned, she was a director and was entitled to inspect the documents as of right. She conceded that she was not involved in the day-to-day management of the respondent. But she asserted that as a director, she was entitled to inspect the accounting and financial records as these are relevant in terms of her liability as a director. She said that in light of the hostility between the directors, it becomes all the more imperative that inspection be allowed.

[39] We have carefully examined the appeal record and in particular, the rival contentions as stated in the respective affidavits that were filed by the parties. We have also studied the cases that were relied upon by the parties. From the several case laws that were read to us, we find it to be quite well-settled that the appellant, as a director of the respondent, has the absolute right to inspect the documents and the appellant is not required to provide any covenant or reasons for the inspection.

[40] In amplification, we are compelled to state here that it is trite that the right of a director of a company to inspect the company's accounting and other records is a right existing in common law. Thus, s. 254 of the Companies Act 2016 is declaratory of the director's common law right. According to the cases, a director's right to inspect accounting and financial records is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company.

[41] Thus, the obligation of the company to allow inspection by its director is regarded as mandatory. And, being an "absolute" right, a director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis. As such, the right to inspect remains extant so long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company.

[42] According to the established jurisprudence, there is no residual discretion in the court to refuse inspection. The principle is that where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event, satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him. Thus, in those circumstances, the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company.

[43] We agree with the submissions that were made by counsel for the appellant that the commencement of the oppression suit and the lodging of the police report (pertaining to the unlawful assignment of the trademark to SNE-G) which led to LCT and his daughter being charged for CBT cannot be construed as an ulterior or improper motive on the part of the appellant against the respondent itself. The appellant may well have had ulterior motives against others *eg*, directors and shareholders, but not the respondent itself.

[44] Indeed, on the issue of the unlawful assignment of the respondent's trademark to SNE-G, the appellant was quite obviously vindicated by virtue of the Court of Appeal's judgment (see: [2023] 2 CLJ 19 at para. [35]).

[45] In the circumstances, it appears to be the case that the learned Judicial Commissioner did not properly appreciate that the ulterior or improper motive referred to in the case of *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527 or *Liaw Yeou Huah v. Wong Kee Kian & Ors* [2016] 1 LNS 1810; [2016] MLJU 1589 are confined to motives against the company, not others like directors or shareholders of the company.

[46] As correctly pointed out by counsel for the appellant, the oppression suit and the CBT charge merely demonstrate hostility towards the other directors and shareholders of the respondent and not the respondent itself. But, it was contended by the respondent in its affidavits that the appellant was seeking to obtain the respondent's financial records and documents so as to launch further attacks and was a launch-pad to injure the respondent. With respect, we see no evidence of intention by the appellant to injure the respondent. She may well have an intention to commence other legal proceedings against the directors and shareholders but that is her right. The germane question here is whether there was any evidence that she was intending to injure the respondent. The answer is – no.

[47] Here, it is important to emphasise that it requires a strong case to disentitle a director from the statutory right of inspection under s. 245 of the Companies Act 2016 and the burden is on the respondent to establish positively by convincing evidence (and not just by making bald assertions or speculation) that in making the application under s. 245 of the Companies Act 2016 the appellant was actuated by improper motives *vis-a-vis* the respondent.

[48] Clearly, it is unlikely that the appellant will sit still. She will possibly continue her crusade against the other directors and shareholders. But the key point here is that the appellant cannot be precluded from exercising her statutory right of inspection of the documents as a director of the respondent, even if there is a possibility that future litigation may ensue from the inspection of the documents in furtherance of the ongoing hostility between the directors and shareholders of the respondent. See: *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273 at para. [11].

[49] Thus, applying the principles of law that are derived from the cases that were read to us, we are satisfied that the learned Judicial Commissioner had misdirected herself in holding at [26] that "the failure to provide reasons and to provide the undertaking, together with the plaintiff's previous action in using the defendant's documents to which she was given access, to lodge a police report against [LCT] and to initiate the oppression [suit], have led the court to find that the defendant has proven that the plaintiff's request for inspection of the documents is made in bad faith and with an ulterior, improper or collateral purpose".

[50] Having due regard to the factual matrix of facts and the conduct of the parties and the exchange of correspondence and affidavits, we are of the considered view that the respondent's position in refusing to allow the appellant to inspect the documents was untenable, to say the least.

[51] It is important to emphasise that a director's non-participation of the day-to-day affairs of the company does not extinguish the director's right to inspect the company's documents. In *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103, the court said at [54]:

> [54] As such, the defendant's suggestion that the plaintiff is not entitled to encl. 1 because he is a foreign national who resides overseas, or that the plaintiff is non-executive and also merely a corporate representative of NSSB is entirely devoid of merit. The law, as so clearly encapsulated in ss. 131B and 132 of the CA does not make a distinction on the powers and duties of company directors on the basis of nationality, residence, or whether the director is performing an executive role or otherwise, or whether the director is a nominee or a corporate representative of a shareholder. It is a fundamental principle of company law that the right to inspect emanates from the plaintiff's office as a director of the defendant company. Directors of a company enjoy the same right of inspection under the law. The law admits of no distinction between the statutory and fiduciary duties owed by different categories of directors.

[52] The same point was also made to the case of *Ho Yee Chin v. Ho Min Hao & Ors* [2016] 6 CLJ 728, where the court held that,

> There was no merit in the contention by the first and second defendants that the fact that the plaintiff had never run or managed the business from the day it was incorporated until this application was made suggested that the plaintiff sought inspection, not to discharge her duties as director. The right of inspection by a director is an inalienable right and is not restricted in any way.

[53] We are therefore unable to agree with the learned Judicial Commissioner who opined that the appellant's actions in lodging the police report and the oppression suit and the fact that she was not actively involved in the management of the respondent, can be construed as suggesting that the appellant was actuated by improper motives, or that she was likely to injure the respondent, or that she had no need for the documents.

[54] The appellant's past actions in lodging the police report which resulted in LCT and his daughter being prosecuted and in filing the oppression suit are in our view, manifestations of the appellant's right as a shareholder/ director of the respondent to protect and preserve the assets of the respondent – the trademark which LCT had assigned to his daughter's company for a mere RM10. As we said earlier, the appellant was justified in mounting the oppression suit as the Court of Appeal found in her favour and granted the requisite reliefs.

[55] As for the appellant's hostility towards her co-directors, we do not see this as a disqualification for an application under s. 245 of the Companies Act 2016. The fact that the appellant is an inactive director is also irrelevant. In fact, her hostility towards her co-directors and her passiveness as a director of the respondent makes it all the more compelling that she should

be given the right to inspect the documents, which in law, is an "absolute right". We are thus satisfied that the decision of the learned Judicial Commissioner in refusing to make the order under s. 245 of the Companies Act 2016 was in all the circumstances, plainly wrong and warranted appellate intervention on our part.

[56] As such, we are constrained to hold that the learned Judicial Commissioner erred in dismissing the originating summons. Thus, appellate intervention is warranted. Ordinarily, we would have allowed the appeal. However, it is necessary for us to consider the impact of the post High Court event, namely, the appellant's removal as director.

[57] The next part of our judgment deals with the appellant's removal as a director of the respondent with effect from 9 December 2021. It may be noted here that when the originating summons was filed on 7 April 2021, and later dismissed on 28 September 2021, the appellant was still a director of the respondent. The appellant filed the notice of appeal on 14 October 2021. She was a director as of the date of filing of the notice of appeal. However, by a directors' resolution dated 9 December 2021, the appellant was removed as a director of the respondent.

[58] As such, we now proceed to deal with the next issue – whether the appellant is entitled to obtain an order for inspection in light of the decision of the Singapore Court of Appeal in *Haw Par Bros (Pte) Ltd v. Dato Aw Kow* [1973] 1 LNS 44; [1973] 2 MLJ 169 (SGCA) ("*Haw Par*"). The question before the Singapore Court of Appeal was – whether an order for inspection which had been made by a court under s. 167(5) of the Companies Act continues in full force and effect after the director of a company ceases to be a director? The case is highly relevant as s. 167(5) of the Singapore Companies Act is in *pari materia* with our previous s. 167(6) of the Companies Act 1965 and the present s. 245(8) of the Companies Act 2016.

[59] In that case, on 17 December 1971, the respondent director (Dato Aw Kow) filed an originating summons ("the OS") under s. 167(5) of the Singapore Companies Act seeking an order to inspect the accounting and other records of the company by his auditor, Mr Curran. On 22 December 1971, the order was made by the Singapore High Court ("the inspection order").

[60] The inspection order did not appear to specify a time limit during which the accounting and other records of the company should be kept open for the inspection of Mr Curran, nor also the period of the accounting and other records to be inspected, including whether it related to the period within which the respondent was a director. The company did not appeal the inspection order. Mr Curran commenced inspection of the accounting and other records of the company shortly after the inspection order and continued until 22 June 1972, approximately six months into the inspection order,

when he (Mr Curran) left Singapore on leave. On 20 July 1972, the respondent was removed as a director of the company. On 17 August 1972, the solicitors for the company informed the solicitors for the respondent that the inspection order had lapsed upon the respondent ceasing to be a director and hence Mr Curran was no longer free to inspect the accounting and other records of the company.

[61] Thereafter, the respondent commenced a fresh civil suit on 18 August 1972, at a time when he was no longer a director of the company, claiming a declaration that the inspection order remained in full force and for orders to restrain the company from preventing or obstructing Mr Curran from inspecting, and pending the same obtained an *ex parte* interim injunction in those terms, which was upheld by Choor Singh J *inter partes* ("injunction order") on the basis that the respondent had made out a strong *prima facie* case for his inspection to continue and the balance of convenience lay in favour of the injunction order to continue. (See: *Dato Aw Kow v. Haw Par Bros (Pte) Ltd & Anor* [1972] 1 LNS 25; [1972] 2 MLJ 225).

[62] Justice Choor Singh was of the opinion that the right expressly conferred by s. 167(3) on a director to inspect the accounts and other records of a company would be illusory and would lead to unreasonableness and injustice if s. 167(3) were to be construed to confer the right to inspect on a director only so long as he is and continues to remain a director of the company. We may add that the same point was made here by counsel for the appellant. For completeness, we reproduce here the relevant passage from Justice Choor Singh's judgment (230 MLJ) where he said:

> Parliament having conferred on a director the right to inspect, the court ought not so to construe the statute as to make the right conferred illusory, for that would be the result if the court were to hold that the inspection must cease upon removal of the director. On such an interpretation the court would in effect be rendering the statute of no avail in the case of an honest director who obtains an inspection order under section 167(5), if his fellow directors, who are dishonest, can by causing him to be removed the very next day, nullify the said order. In my opinion the right of a director, who has obtained an inspection order under section 167(5), to continue to inspect after he ceases to be a director, cannot be denied without examining what his interest is in such inspection and whether further inspection is reasonably necessary for the protection of that interest. To deny him further inspection without such enquiry would render the right to inspect practically useless. In my opinion, the interpretation which the defendants have put forward, would lead to unreasonableness and injustice, and must therefore be rejected because the court must presume against any intention on the part of the Legislature to cause injustice. For these reasons I hold that an inspection order obtained by a director under section 167(5) of the Act does not, *ipso facto*, lapse upon his ceasing to be director. It remains in full force until it is discharged, rescinded or varied by the court upon the application of

A either party. On such application, the court has a discretion to allow the inspection to continue, notwithstanding the fact that the director has been removed, if the circumstances of the case so warrant. If further inspection is reasonably necessary for the protection of the applicant's legitimate interest, the court must do justice in the matter and allow further inspection, for a reasonable period, of the accounts and other records of the company for the period during which the applicant was a director.

[63] On appeal by the company against the injunction order, the Singapore Court of Appeal allowed the appeal and set aside the injunction order, holding that (a) an ex-director cannot successfully invoke the right of inspection under s. 167 of the Singapore Companies Act (Cap 185); (b) the director's right of inspection granted by the inspection order ceases once he is no longer a director, unless there was a *prima facie* case that the shareholders had no power to remove the said director to support the injunction applied for, of which there was none in that case; and (c) the inspection order in that case did not amount to a true injunction either interim or perpetual as it did not specify any time limit within which the accounting and other records of the company were to be open for inspection.

[64] According to *Haw Par*, a director's right to inspect and, if necessary, take copies of documents belonging to a company are due to "the nature of a director's duties and to enable him to properly perform his duties as a director". The Singapore Court of Appeal disagreed with Justice Choor Singh's interpretation of the statutory provision and was very much influenced by the decision of Jacobs J in *Funerals Of Distinction Pty Ltd* [1963] NSWR 614 where the learned judge had referred to the almost equivalent Australian statutory provision and said that once a director ceases to hold that office, then the statutory right of inspection also ceases.

[65] The Singapore Court of Appeal then went on to state the principle at p. 170 MLJ as follows:

> It seems to us clear that section 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under section 167(1) only to persons who **are the then** directors of the company. It is clear that section 167(3) cannot be successfully invoked by an ex-director. In our opinion where an ex-director wishes to inspect such accounting and other records of a company he cannot rely on section 167(3) and must rely on other grounds because it is clear law that an ex-director, as such, has no proprietary, managerial or other similar interest in the accounting and other records of a company.
>
> It seems to us clear also that section 167(5) is in aid of the right to inspection which is given to a director by section 167(3) and therefore the court has no power under section 167(5) to order that the accounting and other records of a company should be open for inspection on behalf of an ex-director of that company. (emphasis added)

[66] Since the decision of the Singapore Court of Appeal in *Haw Par*, the courts in Malaysia have consistently applied the principle alluded to earlier (p. 170 MLJ) – an ex-director is not entitled to seek the aid of the court for an order of inspection. It was argued for the appellant that in this case, the appellant was a director of the respondent when she moved the High Court, and also when she filed her notice of appeal. It was also argued that the appellant is only seeking to inspect the accounting and financial records of the respondent for the period from 2015 to 2019 and this was well within the period when she was a director of the respondent. It was also argued that the appellant's removal was not valid as she was here removed by a director's resolution whereas under the respondent's constitution and pursuant to s. 206(1)(a) of the Companies Act 2016, she can only be removed by a resolution of the shareholders at a general meeting.

[67] In our view, the present appeal is not the proper forum to deal with the issue of the alleged invalidity of the appellant's removal as a director of the respondent. That has to be taken up by way of separate proceedings. If and when the appellant succeeds in impugning her removal as a director of the respondent, then she can make a fresh application under s. 245(8) of the Companies Act 2016 for inspection. But until that happens, as far as we are concerned, the *Haw Par* principle applies to the facts of the present case, with the result that the appeal fails. We must add that but for the appellant's removal as a director, and the *Haw Par* principle, we would have allowed the appeal and granted order in terms of the originating summons. We conclude by stating that s. 245 of the Companies Act 2016 exists for the benefit of a director in the performance of his/her duties as a director.

[68] Hence, as the Court of Appeal had clearly enunciated in *Tan Kim Hop & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527, at para. [16](4), "the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director ..." . As such, upon the appellant ceasing to be a director, she is no longer entitled to seek relief under s. 245 of the Companies Act 2016. It is also relevant for us to refer to *Walter Woon* on *Company Law* (3rd edn) at p. 415 (para. 10.47) where the learned authors had opined that, "this right of inspection may be exercised only by directors and not ex-directors, and any order of court authorising an auditor to inspect such records on behalf of a director will be ineffective after the director's removal".

[69] For completeness we would add that the same view was articulated by the learned authors, Lau Zhong Yan and Sebastian Liew Tzen Jue in their article, "*A Director's Absolute and Unqualified Right to Inspection: Section 245 of the Companies Act 2016, a Statutory Mandate*" – [2021] 3 MLJ clxix, where the issue at hand is discussed at p. clxxii under the heading "Do retired or former directors retain the right to inspect the accounting or other records of a company?".

[70] We now deal with costs. The following matters are relevant to the issue of costs of this appeal. In this regard, we take cognisance of the fact that the issue of the appellant's removal as a director and the *Haw Par* principle were not taken up in the respondent's original submissions before this court. These matters came up during the course of oral submissions and questions posed by this court on 16 August 2023. In the circumstances, although the appeal stands dismissed, it is necessary to note that the respondent failed in so far as the merits of the appeal are concerned. The outcome of this appeal is based on the appellant's removal and the application of the *Haw Par* principle.

Outcome

[71] The appeal is dismissed. We did not think that the respondent should be granted any costs. As such, we exercised our discretion under O. 59 r. 2(2) of the Rules of Court 2012 and declined to award costs to the respondent. As such, the order of this court is that for the reasons mentioned above, the appeal is dismissed with no order as to costs. We also order that the costs awarded by the High Court be set aside, and if it has been paid, to be refunded to the appellant.